

**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

BellSouth Telecommunications, Inc.

**Request For Declaratory Ruling that State
Commissions May Not Regulate Broadband
Internet Access Services By Requiring BellSouth
To Provide Wholesale or Retail Broadband
Services to Competitive LEC UNE Voice Customers**

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COMMENTS OF COMPTel/ALTS

CompTel/ALTS hereby submits its comments in response to the Commission's Notice of Inquiry in the above captioned docket. As the Commission correctly recognized, its earlier determination in this docket¹ to preempt state commissions from requiring ILECs to provide DSL service to an end user over the same UNE loop facility that a CLEC uses to provide voice service failed to address the inevitable consequences of what appears to be a tacit federal endorsement of anticompetitive tying arrangements and/or refusals to deal by regulated entities. In the interest of promoting broadband deployment, and intramodal and intermodal voice competition, as well as in preserving for customers the ability to choose the manner in which they receive both basic and advanced telecommunications services, CompTel/ALTS urges the Commission to

¹ *In the Matter of BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services By Requiring BellSouth To Provide Wholesale or Retail Broadband Services To Competitive LEC UNE Voice Customers*, WC Docket No. 03-251, Memorandum Opinion and Order and Notice of Inquiry, FCC 05-78, at ¶ 37 (released March 25, 2005).

conclude that Sections 201 and 202 of the Communications Act preclude incumbent local exchange carriers from bundling services such that customers are forced to pay for basic services they neither need nor want in order to in order to obtain advanced services that they do need and want.

INTRODUCTION

Section 706 of the Telecommunications Act directs the Commission to encourage the deployment of advanced telecommunications capability to all Americans by utilizing measures that promote competition in the local telecommunications market. According to the Commission's most recent report to Congress on the availability of advanced telecommunications capability, however, penetration rates remain low despite the fact that the vast majority of Americans have access to broadband services. Indeed, only one in five consumers with access to advanced telecommunications capabilities actually subscribes to such services. *Availability of Advanced Telecommunications Capability in the United States*, Fourth Report To Congress, FCC 04-208 at 38 (September 9, 2004). Recent studies show that the U.S. has dropped to 12th place worldwide in broadband penetration,² a statistic that cannot be reconciled with this Commission's pledge to foster broadband competition, installations and subscribership. The failure of the U.S. to keep pace with the broadband penetration rates of other nations is not surprising given the Commission's unwillingness to police Bell tying practices. Unfortunately, these trends are likely to continue so long as the Commission sanctions the ILECs' anticompetitive practice of tying legacy services with advanced services such

² Organization for Economic Co-operation and Development, *OECD Broadband Statistics*, December 2004 (May 24, 2005).

that consumers are unable to purchase advanced services independent of legacy services, and prohibits state regulatory commissions from requiring that the bundles be untied.

Significantly, the Commission has identified price as one possible reason for the gap between the availability of advanced services and subscribership.³ It does not take an economist to deduce that consumers are likely to find advanced services more affordable if they are permitted to shop independently for the best price on advanced services *and* the best price on voice service, rather than being required to purchase the incumbent's legacy voice service as a precondition to subscribing to its DSL service.

In its Section 706 Report to Congress, the Commission opined that subscribership to broadband services will increase in the future as new applications that require broadband access, such as voice over Internet protocol ("VOIP"), are introduced into the marketplace.⁴ Given the Commission's views on price sensitivity, this opinion clearly assumes that consumers would choose VOIP over legacy voice service, not that they would subscribe to broadband service in order to get VOIP and subscribe to legacy voice service in order to get broadband and pay for both VOIP and legacy voice service. By implicitly condoning the ILEC practice of bundling DSL service and legacy voice service, however, the Commission is denying consumers the right to choose between VOIP and legacy voice service, and allowing the ILECs to use anticompetitive sales tactics for advanced services to protect their core voice markets from subscriber defections. Because bundling the broadband DSL service necessary to use VOIP applications with legacy voice service creates a strong financial incentive for consumers

³ *Availability of Advanced Telecommunications Capability in the United States*, Fourth Report To Congress, FCC 04-208 at 38 (September 9, 2004).

⁴ *Id.* Former Chairman Powell noted that "VOIP services are acting as a demand driver for broadband connections." *Id.* at 3.

to avoid VOIP, the ILECs' tying practices would seem to conflict directly with the Commission's policy and goal of promoting broadband competition and subscribership. The Commission cannot comply with the Congressional directive to encourage the deployment of advanced telecommunications capabilities without requiring ILECs to offer their customers the option of purchasing advanced services independent of legacy services.

I. The Market Is Not Yet Sufficiently Competitive To Abandon Regulation

As the communications marketplace continues to move toward bundled solutions for consumers, the Commission has asked whether competition is supplying sufficient incentives for providers to disaggregate bundles in an effort to maximize consumer choice. The short answer is no. Of the four Regional Bell Operating Companies that control the vast majority of last mile legacy facilities, only Qwest currently offers truly "naked DSL" and does not require consumers to purchase its legacy voice service as a condition of purchasing broadband DSL service.

While Verizon allows DSL customers who want to switch their voice service to a CLEC to keep their DSL service, its DSL offering is only half-naked. Verizon apparently does not make DSL available to customers who relinquish landline voice service altogether. Telecommunications Reports State News Wire, April 19, 2005 at 3. This restriction allows Verizon to continue to earn revenue from the local loop even if the end user chooses a CLEC to provide its voice service. The Commission has previously concluded that no third parties, including cable and satellite providers, are effectively offering, on a wholesale basis, alternative local loops capable of providing narrowband or broadband transmission capabilities to the mass market and that CLECs continue to rely

primarily on unbundled local loops to serve the mass market. *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 at ¶¶ 226, 233 (released August 21, 2003). As a result of CLECs' dependency on Verizon's last mile connections to serve their own customers, Verizon ensures that it retains at least the wholesale revenues from its local loop along with the retail DSL revenues when a customer switches its voice provider. Although Verizon allows its DSL customers to choose an alternative landline provider, it still forces customers who want a broadband connection but who wish to rely solely on wireless or VOIP for voice service into a take or pay (or more accurately, a take and pay) situation.

The fact that the three largest RBOCs retain the ability to require consumers to purchase legacy voice service as a condition of purchasing a DSL broadband connection demonstrates that the Telecommunications Act of 1996's goal of opening all telecommunications markets to competition is far from being realized. As the Commission has previously determined, "Competition in local exchange and exchange access markets is desirable, not only because of the social and economic benefits competition will bring to consumers of *local* services, but also because competition eventually will eliminate the ability of an incumbent local exchange carrier to use its control of bottleneck local facilities to impede free market competition."⁵ A regulatory policy that allows the ILECs to impede free market competition for voice services and IP applications through their continuing control of last mile bottleneck facilities needed for

⁵ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499 at ¶ 4 (1996) (emphasis in the original).

advanced services is fundamentally inconsistent with the purposes and intent of the Act. Although there may come a day when competition is sufficient to provide incentives for the ILECs to disaggregate bundles as a means of maximizing consumer choice, that day has not yet arrived. Until it does, the Commission must take steps to constrain the ability of the ILECs to dictate to consumers what and whose voice service they must take and pay for as a condition of broadband access to the Internet.

II. Sections 201 and 202 of the Act Prohibit Tying DSL and Legacy Voice Service

The Commission should conclusively determine that the ILEC practice of requiring end users to purchase landline voice service as a condition of purchasing DSL service is unjust and unreasonable within the meaning of Section 201 of the Act and, therefore, unlawful. The Commission should also conclusively find that the ILEC practice of refusing to sell DSL service to customers that purchase voice service from a competitor constitutes unjust and unreasonable discrimination in violation of Section 202 of the Act.

There is no question that the ILECs' practice of tying DSL and legacy voice is anticompetitive and has no legitimate technical, business or commercial justification other than to protect their core voice markets from encroachment by intramodal and intermodal competitors. The Commission's data show that the ILECs continue to monopolize DSL service, controlling approximately 95% of ADSL high speed lines in service.⁶ Qwest's successful offering of "naked DSL" proves that there are no technical impediments to providing DSL independent of legacy voice service. Under these

⁶ Industry Analysis and Technology Division, Wireline Competition Bureau, *High-speed Services for Internet Access: Status as of June 30, 2004*, at 3 (December 2004).

circumstances, the willingness of other ILECs to lose a customer and forgo the not inconsiderable earnings DSL service generates merely to punish the customer for choosing to buy voice service from a competitor makes no economic sense and is rational only if it deters customers from actually switching to a different voice provider. And it does have such a deterrent effect. BellSouth for one has conceded that it adopted the practice of refusing DSL service to customers who purchase voice from a competitor because of the huge disincentive it creates for customers to buy service from a competitor.⁷

The regulatory scheme that the Commission is charged with implementing and enforcing is designed to deter and remedy anticompetitive harms. *Verizon v. Law Offices of Curtis Trinko*, 540 U.S. 398 (2004). The Supreme Court has observed with respect to anticompetitive tying practices:

Market power is the power ‘to force a purchaser to do something that he would not do in a competitive market.’ It has been defined as ‘the ability of a single seller to raise price and restrict output.’ *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 464 (1992) (internal citations omitted).

There are four elements to an anticompetitive tying arrangement under the antitrust laws: (1) the tying and tied goods are two separate products; (2) the defendant has market power in the tying product market; (3) the defendant affords consumers no choice but to purchase the tied product from it; and (4) the tying arrangement forecloses a substantial volume of commerce. *United States v. Microsoft Corporation*, 253 F. 3d 34, 126 (D.C. Cir. 2001). Each of those elements is present in the ILECs’ DSL/legacy voice tying

⁷ Medley Global Advisors, Equity Brief, BellSouth: DSL/Voice Bundling Faces Regulatory Obstacles at 3 (Jan. 14, 2004).

arrangements. First, DSL and legacy voice service are two separate products. Second, the ILECs have market power in the provision of DSL service and in many areas are the only carriers offering or able to provide DSL. Third, the ILECs offer consumers no choice but to purchase legacy voice service as a condition of purchasing DSL. Finally, the DSL/legacy voice bundle forecloses a substantial volume of commerce by walling DSL customers off from the voice services available either from a CLEC intramodal competitor⁸ or from a wireless or VOIP intermodal competitor. This practice impairs competition in at least three ways. It allows the ILECs to shield their significant customer bases from local telephone service competition. It allows the ILECs to regain voice customers they may have lost to competitors by requiring end users to boycott other voice providers as a condition of purchasing DSL.⁹ It stifles the implementation of VOIP services which, as the Commission reported to Congress, are poised to accelerate the deployment of broadband facilities and services.¹⁰

Tying DSL service and legacy voice service clearly harms consumers by foreclosing their ability to choose a voice provider and retarding the development of a competitive voice market. Consumers wanting broadband access are, therefore, at the

⁸ As noted above, Verizon apparently will permit DSL end users to purchase voice service from a CLEC using landline facilities, but will not permit them to retain their DSL and purchase voice service from a wireless or VOIP provider.

⁹ See *Lorain Journal v. United States*, 342 U.S. 143, 186 (1951) (refusal of newspaper that was indispensable to local businesses to sell advertising space to customers who also bought advertising on a local radio station violated Section 2 of the Sherman Act).

¹⁰ In the IP services rulemaking, the Commission noted that providers offering VOIP services are beginning to challenge traditional wireline carriers in both the enterprise market and mass market. The Commission also noted that the deployment of broadband facilities has prompted the development “of services and applications that provide broader functionality and greater consumer choice at prices competitive to those of analogous services provided over the PSTN.” *In the Matter of IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28 at ¶ 3 (released March 10, 2004). Prices for advanced services are not so competitive when the consumer is forced to purchase the analogous legacy service in order to obtain the broadband connection.

mercy of the monopoly providers that force them to maintain and pay for legacy voice landline connections, regardless of whether they want or need such connections, in order to purchase a broadband connection. Allowing the ILECs to implement DSL policies that control their customers' choice of voice providers is antithetical to the operation of a free and competitive marketplace and must be restrained through regulation.

Sections 201 and 202 of the Act are the bedrock of the consumer protection obligations of common carriers. Pursuant to Section 201, unjust and unreasonable practices and regulations for and in connection with communications services are deemed unlawful. Pursuant to Section 202, it is unlawful for any common carrier to impose unjust or unreasonably discriminatory practices or regulations and to make or give any undue or unreasonable preference to any class of persons or to subject any class of persons to any undue or unreasonable prejudice or discrimination. By refusing to sell DSL service to customers who choose to take voice service from a competitive provider, the ILECs are engaging in unjust and unreasonable practices, are discriminating against and prejudicing those consumers who prefer to purchase voice from intramodal or intermodal competitors and are conferring unjust and unreasonable preferences on those customers who do purchase their voice service from the ILECs. The Commission should so find and require ILECs to offer customers the option of purchasing truly "naked DSL" service as an alternative to any DSL/legacy telephone service bundle.

Using Sections 201 and 202 to discipline the ILECs' anticompetitive bundling behavior will have no impact on the Commission's pending rulemaking proceeding to

determine whether ILECs are dominant in the provision of broadband services.¹¹ The bans on unreasonable and discriminatory practices codified in Sections 201 and 202 apply equally to dominant and non-dominant carriers. *Motion of AT&T To Be Reclassified As A Non-Dominant Carrier*, 11 FCC Rcd 3271 (1995). The ILECs are clearly dominant in the provision of DSL service, but their services will remain subject to Sections 201 and 202 regardless of whether the Commission determines that they are non-dominant in the provision of broadband services generally.

CompTel/ALTS acknowledges the Commission's request for comments on the impact of its classification of cable modem services¹² as information services and its tentative conclusion in the Broadband rulemaking proceeding that wireline Internet access services are information services¹³ on this proceeding. Due to the imminence of the Supreme Court's decision in the *Brand X* case,¹⁴ in which the Commission's classification of Internet access services as information services not subject to Title II regulation is squarely at issue, CompTel/ALTS submits that it would be premature to comment at this time. Upon release of the Supreme Court's decision, CompTel/ALTS will supplement these comments to the extent necessary.

¹¹ *In the Matter of Review of Regulatory Requirements For Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, FCC 01-360 (released December 20, 2001).

¹² *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002), *aff'd in part, vacated in part and remanded*, *Brand X Internet Services, Inc. v. FCC*, 345 Fc.3d 1120 (9th Cir. 2003), *cert. granted*. December 3, 2004.

¹³ *In the Matter of Appropriate Framework For Broadband Access To The Internet Over Wireline Facilities*, CC Docket 02-33, Notice of Proposed Rulemaking, FCC 02-42 (released February 15, 2002).

¹⁴ *Federal Communications Commission v. Brand X Internet Services, Inc.*, Case Nos. 04-277 and 04-281 (argued March 29, 2005).

CONCLUSION

For the foregoing reasons, CompTel/ALTS respectfully requests that the Commission find that the ILECs' refusal to sell advanced services to customers who do not purchase landline legacy voice service on their networks constitutes an unjust, unreasonable and discriminatory practice under Sections 201 and 202 of the Communications Act. CompTel/ALTS also requests that the Commission require ILECs to offer "naked DSL" service in addition to any DSL offering bundled with other services.

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Respectfully submitted,

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